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91-1566

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED

STATES

OCTOBER TERM, 1991

REPUBLICAN PARTY OF OREGON, JAMES WORTHINGTON, WILLIAM F. CLEMENTS, RONALD W. TOBIAS, RICHARD L. DICKINSON, R. STONE ROSE, CLAYTON ZEEB, AND ANITA B. EBERLEIN,

PETITIONERS,

v.

PHIL KEISLING, IN HIS CAPACITY AS SECRETARY OF STATE OF THE STATE OF OREGON,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals err in holding that First Amendment rights are not implicated by a state redistricting plan that denied plaintiffs and 101,000 others access to state senate elections in which they otherwise could have voted?

2. Did the Ninth Circuit err in holding that a dilution of voting power resulting from a redistricting plan, whereby some electors will cast fewer votes than others, does not violate the equal protection clause?

PARTIES

All of the parties to this proceeding are named in the caption. All of the petitioners were plaintiffs in the District Court and appellants in the Court of Appeals. No party is a corporation requiring a listing of affiliates pursuant to Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, which affirmed the decision of the United States District Court for the District of Oregon.

DECISIONS BELOW

Neither decision below has been published. The Circuit Court's decision is reproduced at Appendix A. The appeal to that court was taken from the District Court's judgment and opinion which are reproduced at Appendix B.

JURISDICTION OF THIS COURT

The United States Court of Appeals for the Ninth Circuit rendered its decision on March 18, 1992. This Court has jurisdiction to review by certiorari

the decision of the Court of Appeals pursuant tc 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

At issue is the constitutional validity of one aspect of respondent's recent reapportionment of the inhabitants of the State of Oregon among the state's senatorial districts. The requirement of a reapportionment, and respondent's authority to perform it, are found in the Constitution of Oregon, Article IV, § 6. Other significant provisions of the Constitution of Oregon, relevant to this case, are Article II, §§ 2 and 8, and Article IV, § 4. Relevant state statutory provisions are the current and pre-1987 versions of O.R.S. 171.051.

Petitioners rely on the provisions of Amendment I of the United States Constitution, as made applicable to the

states through Amendment XIV, on Amendment XIV and on 42 U.S.C. § 1983.

All of these constitutional and statutory provisions are reproduced in Appendix C.

STATEMENT OF THE CASE[1]

This was an action for declaratory and injunctive relief. Petitioners claimed that certain aspects of Oregon's state legislative reapportionment plan ("the Plan") are in violation of the United States Constitution.

Petitioners are the Republican Party of Oregon and seven Oregon electors, each residing in a different state senate district and each of whom, as a result of changes made by the Plan in legislative district boundaries, will be deprived of an opportunity to cast a vote in 1992 for their only

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[1]The relevant facts are not in dispute. The facts stipulated to by the parties are reproduced at Appendix D.

representative in the Oregon State Senate. Respondent ("the Secretary") is Oregon's Secretary of State, the state official who prepared the Plan and who is responsible for the administration and enforcement of Oregon's election laws.

Under Oregon law, if the legislature fails to reapportion the Oregon legislature, the Secretary of State performs that task. Oregon Const. Art. IV, § 6. After the 1991 Oregon legislature failed to reapportion the state's legislative districts following the 1990 census, the Secretary did so.

The Plan moved certain state senate district boundaries. Pursuant to Oregon Const. Art. IV, § 6(1), the Secretary assigned incumbent senators to the newly-defined districts. The Oregon legislature has 30 senators; one-half

are elected each biennium, pursuant to Oregon Const. Art. IV, § 4.

Because of the redrawn district boundary lines and the assignment of senators, there are 101,137 Oregonians of voting age who otherwise would have been eligible to vote in scheduled elections for senators to represent them in the 1993 legislative session and who now will not be eligible to vote for a senate representative until the 1994 elections.

These conditions affect 11 of Oregon's 30 senate districts. The district-by-district details are shown at App-71 and App-72.

Petitioners filed a complaint in the United States District Court for the District of Oregon alleging that the Plan had deprived the individual petitioners and persons similarly situated of their right to vote in violation of the First Amendment and

42 U.S.C. § 1983. They sought declaratory and injunctive relief. the District Court refused to grant relief and entered judgment in favor of respondent. Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. After expedited proceedings, the Court of Appeals affirmed the judgment of the District Court.

BASIS FOR FEDERAL JURISDICTION

Petitioners alleged a denial of their rights under the United States Constitution and a violation of the Federal Civil Rights Act, 42 U.S.C. § 1983. The United States District Court had jurisdiction pursuant to that statute and pursuant to 28 U.S.C. § 1331. The Circuit Court had jurisdiction to review the District Court's decision pursuant to 28 U.S.C. § 1291.

ARGUMENT

1. Reasons for Granting Certiorari.

The "one-person-one-vote" decisions of this Court have mandated a decennial project of enormous proportions, whereby literally thousands of congressional, state house and state senate districts are redrawn with the goal of achieving an equal balance among the votes of all electors. More than twenty states have state senates with members serving 4-year terms. As a result of nationwide redistricting, countless voters, perhaps millions, are moved from districts that last voted for state senate candidates in 1988, would normally have voted in 1992, but will not now vote until 1994, while others who voted in 1990 will vote again in 1992.

A few states rectify this imbalance in voting power by electing all their

senators after a decennial election[2]; however, most do not. This case gives the court the opportunity to resolve two significant federal issues:

(1) Specifically, does this dilution of the vote implicate First Amendment rights? Equal protection rights? Numerous cases have considered this issue, all in an equal protection context, but this Court has not yet resolved it.[3] As aforesaid, the question is apropos in over 20 states.

(2) More generally, what is the extent of the protectible First

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[2]See, e.g., Texas Const. Art. 3, § 3 (amended 1986). Florida Const. Art. III, § 15(a), construed in In re Apportionment Law, 414 So.2d 1040 (Fla. 1982).

[3]See, e.g., McCall v. Legislative Assembly, 634 P.2d 223 (Or. 1981); Mader v. Crowell, 498 F. Supp. 226 (M.D. Tenn. 1980); Pate v. El Paso County, 337 F. Supp. 95 (W.D. Tex.); Terrazas v. Clements, 581 F. Supp. 1319 (N.D. Tex. 1983). Cf. Schaefer v. Tohmson, 251 F. Supp. 450 (D.C. Wyo. 1965), giving relief similar to that prayed for herein.

Amendment right in voting? Is the interest primarily based on rights of association, so that there must be some burden on independent voters, Republicans or Democrats as such, or is the interest also based on freedom of expression, so that it is infringed by a burden that cuts across associational lines? Does the weighing process of Anderson v. Celebrezze, 460 U.S. 780 (1983), imply a greater degree of protection for voting rights than that given by earlier equal protection cases? Did Anderson correctly distinguish Storer v. Brown, 415 U.S. 724 (1974), or did it really overrule it?

This Court has recently heard argument on Burdick v. Takushi, 927 F.2d 460 (9th Cir. 1991), cert. granted ____ U.S. ____, 112 S. Ct. 635, 116 L. Ed. 2d 653 (1991), which conflicted with Dixon v. Maryland State Admin. Board of Election Laws, 878 F.2d 776 (4th Cir.

1989), on the permissible degree of encumbrance on write-in candidacies. This case offers a related question, but of considerably broader import, because herein we must examine the First Amendment rights of voters who are directly, not indirectly, impacted. Petitioners submit that it could be most useful to this Court to hear arguments herein prior to deciding Burdick.

2. First Amendment Rights Are Implicated; the Court Should Have Applied the Weighing Process of Anderson v. Celebrezze.

The Ninth Circuit held that what it called a "postponement" of petitioners' right to vote did not implicate First Amendment rights. It was wrong.

In Anderson v. Celebrezze, 460 U.S. 780 (1983), this Court held that an Ohio law imposing an early filing deadline on independent candidates violated the First Amendment. Although the direct

impact of that law fell upon potential candidates rather than upon voters, 460 U.S. at 786, the Court's primary concern was with the law's indirect effect, which was to "burden" the basic constitutional rights of "an identifiable segment" of the voters in a scheduled election. 460 U.S. at 786, 792, 806. The basic constitutional rights involved were freedom of association and freedom of expression, rights which are protected by the First Amendment. 460 U.S. at 787-88. In Tashjian v. Republican Party of Connecticut, 497 U.S. 208 (1986), the Court again protected the right to vote under the First Amendment, recognizing that voting is a fundamental right which is itself an act of political association. 497 U.S. at 216, 217.

Anderson and Tashjian have made it clear that a law which serves a compelling state interest, and which

does not involve any invidious discrimination, will nevertheless be stricken if the need to serve the state's interest is outweighed by the law's impact on voting rights:

> The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote [citation omitted] or, as here, the freedom of political association.

Tashjian, 497 U.S. at 217.

The Court has adopted a test which weighs the "character and magnitude" of the burdens placed on the voters' First Amendment rights against the "legitimacy and strength" of the state's competing interests and "the extent to which those interests make it necessary to burden the plaintiff's rights." Anderson, 460 U.S. at 789. The Ninth Circuit did not reach the weighing test. It held that the state's action herein did not implicate First Amendment rights.

Anderson held that First Amendment rights are implicated where there is a "particular burden on an identifiable segment" of voters. Anderson, 460 U.S. at 792 (emphasis added). The "burden" therein was the limitation on the access of independent candidates to the ballot. As in Anderson, there is here "a particular burden on an identifiable segment" of Oregon voters. The burden is what the Ninth Circuit called a "postponement" of their right to vote, App-5. Oregon voters vote every four years for a single representative in the Oregon senate; petitioners herein must wait six years to cast their vote. A postponement is a burden. And, for those voters who will die, move away, or become incapacitated, the "postponement" will be a denial.

The Ninth Circuit also characterized the injury as "a temporary dilution of voting power," App-8. A

"temporary dilution" is nonetheless a "burden." First Amendment rights are implicated.

> And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Reynolds v. Sims, 377 U.S. 533, 555 (1964).[4]

As petitioners have repeatedly emphasized, a finding that a dilution of their vote implicates First Amendment rights does not resolve the case in their favor. The state may justify the burden in the weighing process of Anderson. But, the Ninth Circuit stops short of that weighing process; it held that a "postponement" or "temporary

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[4]Reynolds v. Sims, was decided on an equal protection basis. However, the logic expressed in the quotation is just as applicable to a First Amendment analysis. The later First Amendment voting rights cases have looked to the teaching of equal protection cases, see Anderson, 460 U.S. at 787.

dilution" of the vote is not a burden on voter rights; no justification is required.

The Ninth Circuit seemed to find some comfort in its characterization of petitioners' rights as an "expectation of voting." That of course proves too much. Anderson, Tashjian and most other voting rights cases are based on an "expectation."

The Ninth Circuit stated that "appellants are not being deprived of a voice in any scheduled election." That is an argument likely to be more convincing to a lawyer than to the voters involved. Petitioner James Worthington lives in an Oregon neighborhood that voted for a state senator in 1988 and would have voted again in 1992 in scheduled primary and general elections. This year there will be a scheduled election for the Senate seat for which he last had the

opportunity to vote. However, he will be denied access to that scheduled election because he has in effect been moved out of the district, although his residence remains the same as it has been for years. He will not vote at all for a senator in 1992. It would be most difficult to convince him that he is not "being deprived of a voice in any scheduled election."

Once again, defendant may justify this action. But it is wrong to say that these petitioners are not being "deprived of a voice in any scheduled election." They are being deprived of any voice in the 1992 primary and general elections for their only representative in the Oregon Senate. Without this action by defendant, they would have voted in those elections.

First Amendment rights are implicated; the weighing process of Anderson should have been applied.

3. The Anderson Test Applied: The Legitimacy and Strength of State Interests; the Necessity of the Burden.

The first step in the Anderson weighing analysis is to "identify and evaluate the precise interests put forward by the state" and "determine the legitimacy and strength of each of those interests [and] consider the extent to which those interests make it necessary to burden the plaintiff[s'] rights." Anderson, 460 U.S. at 789.

We will first consider defendant's claimed interests one at a time. Then we will note factors diminishing the significance of all the interests that might be claimed by defendant.

A. The Necessity To Reapportion.

The state clearly has an interest in doing what the Secretary has done; it must meet constitutional mandates. However, when this Court discharges its

duty to "consider the extent to which those interests make it necessary to burden the plaintiffs' rights" in this case, as directed by Anderson, 460 U.S. at 789, the state's admitted interest in reapportioning has no weight. It can be given no weight because it is obvious that it is not at all necessary to disenfranchise any voters in order to effect Oregon's reapportionment. The reapportionment and appointment of the senators for the new Oregon districts was completed 11 months before the mid-term general election. The state can simply do what it does when appointments result from vacancies, that is, put the appointed seats up for election, see O.R.S. 171.051. At least two states reelect all senators after each decennial reapportionment.

The need to reapportion does not make it necessary to disenfranchise one Oregon elector.

B. The Cost and Inconvenience of Special Elections.

As this Court found in Tashjian, supra, the cost element here is not significant. Relief for plaintiffs herein would simply add 11 races to the hundreds of contests for state and local nominations and elections and ballot measures. And there is time. The general election is over seven months distant; the primary almost two months distant.

Indeed, Tashjian suggests that administrative and financial considerations cannot be considered significant:

> While the State is of course entitled to take administrative and financial considerations into account in choosing whether or not to have a primary system at all, it can no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party.

479 U.S. at 218.

C. Continuity in the State Senate.

Defendant may claim an interest in the scheme for alternate-year elections of senators in that it provides some continuity in that upper house. That is a legitimate interest. However, the court must consider the "legitimacy and strength" of each claimed interest, 460 U.S. at 789, and that is where defendant's case fails.

It is hard to see how continuity can justify a disenfranchisement. First, the impact on continuity is highly unlikely to be significant. Relief for plaintiff would put 26 of the 30 senators up for election; historical and recent local election results in Oregon suggest that it is highly unlikely that enough incumbents will be defeated to impair continuity

significantly.[5] There is no substantial possibility of the "chaos" defendant will likely claim.

Further, the interest in continuity cannot be more important than the state's interest in "fostering informed and educational expressions of the popular will," which the Anderson court found to be "important and legitimate," 460 U.S. at 796. Yet, Anderson held that interest insufficient to justify even an indirect burden on a "segment" of Ohio's voters.

D. The State's Own Diminution of Defendant's Claimed Interest.

Plaintiffs submit that when a state official posits certain state interests to be weighed under the Anderson test against the voters' interests, it is appropriate -- indeed, necessary -- for the Court to consider the weight that

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[5]In the 1990 general election, all incumbent Oregon senators up for election were re-elected.

the state's lawmakers have placed on those claimed interests. Here, Oregon's lawmakers have demonstrated that factors mitigating against the right to vote have little weight in Oregon.

First, Oregon's constitution includes strong guarantees of the right to vote, guarantees that at least match in significance the Oregon constitutional provision for alternate-year election of the state senators. See Oregon Const. Article II, §§ 2, 8.

Second, the Oregon legislature has recently clearly decided that any conceivable claimed interest in alternate-year elections of senators must yield to the right of the people to elect their senate representatives. Prior to 1987, Oregon law provided that a vacancy in either house of the legislature would be filled by election unless "a general election will not be held within 90 days after the date the

vacancy occurs," O.R.S. 171.051(1)(b) (before amendment by Or. Laws 1987, ch. 380, § 1). Thus, a senator appointed to a vacancy during the first year of the term, or through the first eight months of the second year of the term, would continue to serve throughout the term. The pre-1987 scheme thus strongly favored continuity and avoidance of special mid-term elections.

However, the 1987 legislature rejected that philosophy in a 180-degree turn toward the right of election. A senate vacancy before the mid-term election is now filled by election unless the vacancy occurs <u>within 15 days</u> of the mid-term general election, O.R.S. 171.051. The statute reflects a strong policy that appointed senators must stand for election even though the voters have only a few days' notice, with no information in the voters' pamphlet, and with no opportunity to

educate themselves as to the qualifications and views of the candidates. The statute also imposes a severe burden on the Secretary of State. He must be prepared to put candidates on the ballot on only ten days' notice, O.R.S. 171.051(5)(b).

All the cost, inconvenience and policy arguments that could be made against the elections prayed for herein would apply much, much more to the last-minute elections the Oregon legislature has provided for the 1987 amendments. But, the Oregon legislature has rejected those arguments in favor of popular election. The Oregon legislature itself has decided that there is little "strength" to the interests that the Secretary of State argues herein.

4. The Dilution of Voting Power Is a Violation of Equal Protection Rights.

Again, the District Court and Ninth Circuit rejected petitioners' contention that they had been denied access to the ballot by holding that petitioners' voting rights had not been denied, but only "postponed." This "postponement" justification invokes equal protection considerations. If defendant's actions herein do not "burden" petitioners' voting rights because they simply "postpone" those rights, if this is just a matter of timing, then it is relevant to look at what defendant's actions have done to the timing of the voting rights of others. Oregon's elections data confirm what one would expect: The vote of some electors is postponed, the vote of others is accelerated, and the votes

of most is neither accelerated nor postponed.[6]

The Ninth Circuit response was to "hold that, in the context of reapportionment, a temporary dilution of voting power that does not unduly burden a particular group does not violate the equal protection clause," App 7-8.

That directly contradicts the fundamental proposition of the "one-person-one-vote" cases.

> It would appear extraordinary to suggest that a state could be constitutionally permitted to enact a law providing that certain of the state's voters could vote two, five, or ten times for their legislative representatives, while voters living elsewhere could vote only once.

Reynolds v. Sims, 377 U.S. at 562.

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[6]Elections data indicates that about 165,000 Oregon electors will have their voting opportunity accelerated by redistricting, and the majority of electors will neither enjoy acceleration nor suffer postponement.

The reapportionment cases teach that one person's right must weigh as nearly as is practicable the same as another's. Any doubt must be explained in terms of some strong state interest. See, e.g., Reynolds v. Sims, 377 U.S. at 577. See also Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).

The Ninth Circuit followed one state and several federal lower court decisions (see footnote 3, supra), all holding that a redistricting such as this does not violate equal protection rights. Petitioners respond as follows:

(1) Those cases wrongly assert that the disenfranchisement is a necessary and unavoidable result of redistricting. At least two states have proven that this is not so; the disenfranchisement is avoided by electing all senators after the decennial census. See, e.g., Texas

Const. Article III, § 3; Florida Const. Art III, § 15(a).

(2) Those cases fail to recognize (perhaps because of lack of advocacy) that a postponement of a vote results in a dilution.

Common sense supports petitioners. It makes no sense to say to a voter that "We have weighted your vote exactly the same as your neighbor's. You have exactly the same number of voters in your district as he has. However, he will vote twice in the next four years, while you will vote once." Given the choice, it is most probable that the voters -- unschooled in constitutional law -- would prefer to vote twice in an unbalanced district than once in a balanced district. As this Court has recognized, the opportunity to vote is the opportunity to speak out on the "issues of the day." See Anderson, 460 U.S. at 787. It should not be postponed

as to some voters and accelerated as to others.

Therefore, if the Court retreats to the "postponement" rationale to find that petitioners have not been denied access to the ballot, the Court then confronts the teaching of the cases that launched the reapportionment process in the first place. The "postponement" rationale cannot stand.

Finally, petitioners contend that the equal protection cases do not provide the only test the state's action must meet. Those cases focus on the "legitimacy" of the state's interest and the absence of invidious discrimination. The First Amendment rationale of the later cases (e.g., Anderson and Tashjian) add to this one-sided inquiry a weighing of the competing interests of the state and the voter. Anderson and Tashjian recognize that legitimate state interests, such as voter education, may

have to yield to the voters' right to enjoy unburdened participation in the political process. Therefore, even if a "temporary dilution" of voting rights of a segment of voters is not invalid under a traditional equal protection analysis, it is nonetheless a "burden" implicating First Amendment rights under the rule of Anderson and following cases.

CONCLUSION

The compelling constitutional mandates that impelled this Court to initiate the massive reapportionment process -- calling for countless thousands of hours in computer analysis, public hearings, and political infighting -- also require this Court to bring the process full circle with the comparatively moderate requirement that additional elections be held where necessary to ensure that one form of voting power dilution is not replaced by another.

The decision of the Ninth Circuit and the United States District Court for the District of Oregon should be reversed with instructions to restore petitioners' right to vote by conducting elections in the 11 districts affected.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT

By: _____
John R. Faust, Jr.
Counsel of Record
for Petitioners

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REPUBLICAN PARTY OF OREGON, et al.,	)	
Plaintiffs-Appellants,	)	No. 92-35177
v.	)	D.C. No. CV-92-35-MFM
PHIL KEISLING, in his capacity as Secretary of the State of Oregon,	)	OPINION
Defendant-Appellee.	)	

Appeal from the United States District Court for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Argued and Submitted
February 26, 1992--San Francisco, California

Filed March 18, 1992

Before: William C. Canby, Jr., William A. Norris and Edward Levy, Circuit Judges

Per Curiam

COUNSEL

John R. Faust, Jr., Schwabe, Williamson & Wyatt, Portland, Oregon for the plaintiffs-appellants.

Jack L. Landau, Deputy Attorney General, Salem, Oregon, for the defendant-appellee.

OPINION

PER CURIAM:

The Republican Party of Oregon and several individual Oregon voters appeal from the district court's dismissal of their action for declaratory and injunctive relief. The appellants contend that their first amendment rights were violated by the manner in which Oregon's 1991 reapportionment plan was combined with the staggered term system for state senate elections. We find no constitutional violation, and affirm the judgment of the district court.

In 1991, appellee Secretary of State reapportioned Oregon's legislative

districts to respond to population changes reflected in the most recent federal census. The reapportionment plan altered certain district boundaries. Pursuant to Oregon Const. Art. IV, § 6 (1), appellee assigned incumbent senators to the newly drawn districts. The Oregon legislature has 30 senators, one-half of whom are elected every two years. See Oregon Const. Art. IV, § 4. Appellants represent approximately 101,000 persons of voting age who were formerly represented by senators whose terms were to expire in January 1993 and are now represented by senators whose terms will not expire until January 1995. But for reapportionment, they would have had an opportunity to vote for state senate in the 1992 primary and general elections. Now they will be deprived of that opportunity until 1994. Appellants contend, therefore, that the redistricting, combined with the staggered

term system and the assignment of incumbent senators to their districts, deprived them of their right to vote in violation of the first amendment and 42 U.S.C. § 1983.

Appellants rely primarily on the United States Supreme Court's decision in Anderson v. Celebrezze, 460 U.S. 780 (1983), for the proposition that restriction of access to the ballot constitutes restriction of first amendment freedoms. In Anderson, the Court held that Ohio's requirement that independent candidates file their candidacy at an earlier date than major party candidates violated the first amendment rights of the affected voters.

Appellants compare their plight to that presented in Anderson. However, the Court in Anderson held that the first amendment rights of voters had been burdened specifically because their

choices in a scheduled election had been limited. The Court reasoned that "[t]he right to vote is 'heavily burdened' if that vote may be cast only for major party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.' The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." Id. at 787-88 (citations omitted). Here, the voters' choices in an election are not being limited; the election in which they may vote is, rather, being postponed. Anderson could only apply if we were to hold that there is a first amendment right to vote for state representatives on a particular schedule. We decline the

invitation to find such a right in the first amendment.

Appellants are represented by state senators and will have an opportunity to vote again for state senate in the next elections scheduled for their districts, which are set to take place in 1994. Appellants are not being deprived of a voice in any scheduled election. To the extent appellants had any expectation of voting for state senate in 1992 they mistakenly failed to take into account the legitimate and inevitable consequences of redistricting following the 1990 census.

[3] Appellants contend, however, that their voices are "diluted" by having to wait six years for their next vote instead of four years like voters in some of their neighbor districts. This argument is not about restriction of access to a ballot, however, but about unequal treatment in violation of the

equal protection clause of the fourteenth amendment. The cases cited by appellants for their "dilution" argument are fourteenth amendment cases, not first amendment cases. See, e.g., Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962). The Oregon Supreme Court has held that the assignment of incumbent legislators to newly defined districts after reapportionment does not violate the equal protection clause, even when certain voters will have to wait six years instead of four for their next vote. McCall v. Legislative Assembly, 291 Or. 663, 634 P.2d 223 (1981). Several federal courts have held similarly. See, e.g., Mader v. Crowell, 498 F. Supp. 226 (M.D. Tenn. 1980); Pate v. El Paso County, 337 F. Supp. 95 (W.D. Tex.), aff'd, 400 U.S. 806 (1970). We agree with these courts and hold that, in the context of

reapportionment, a temporary dilution of voting power that does not unduly burden a particular group does not violate the equal protection clause.

Appellants concede the necessity of reapportionment. After reapportionment occurs, the state must necessarily fill vacancies in representation and establish election dates for the newly created electoral districts. Appellants' challenge to the methods chosen by appellee for regulating elections, in this case after reapportionment, has been roundly rejected by the Supreme Court. See Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) ("[n]o provision of the Federal Constitution expressly mandates the procedures that a state . . . must follow in filling vacancies in its own legislature").

In conclusion, we find that neither the first amendment nor the fourteenth

amendment is implicated by the circumstances presented here. The decision of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

REPUBLICAN PARTY OF OREGON, et al.,	)	
	)	Civil No. 92-35-MA
Plaintiffs,	)	
	)	OPINION
v.	)	
	)	
PHIL KEISLING, in his capacity as Secretary of the State of Oregon,	)	
	)	
Defendant,	)	

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MARSH, Judge.

Plaintiffs filed this action seeking a declaration that the effect of the state's 1990 redistricting plan combined with Oregon's system of staggered elections for state senators has an unconstitutional impact upon approximately 101,167 voters in eleven electoral districts.[1] Specifically, plaintiffs argue that the six-year interval that they, and other similarly situated voters, will face constitutes such a substantial burden as to outweigh any state justification for the refusal to conduct special elections in these districts. Plaintiffs contend that the state's action "eliminates" the senate vote they otherwise would have had in 1992. In

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[1] These are identified as the first, third, fifth, ninth, thirteenth, fourteenth, sixteenth, seventeenth, eighteenth, twenty-second and twenty-sixth districts.

order to correct this constitutional infirmity, plaintiffs seek an order directing defendant to conduct primary and general elections in 1992 in the eleven districts identified.

All parties have submitted simultaneous "trial briefs." The underlying facts are not in dispute. There is really only one legal issue raised in these briefs, but it involves two distinct layers of analysis:

(1) Does the 1990 reapportionment plan, when combined with Oregon's procedure of staggering senate elections, implicate plaintiffs' First Amendment rights?[2]

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[2] I emphasize the "combination" of these two factors because plaintiffs do not contend that the reapportionment itself is unconstitutional nor do they challenge the constitutionality of the staggered voting procedures. Thus, plaintiffs' claim raises a unique theoretical question — can two positives equal a negative or, can a constitutional act, combined with a constitutional

(2) If not, then the inquiry ends. If so, then the court must apply the balancing test of Anderson v. Celebrezze, 460 U.S. 780 (1983)[3] and weigh the magnitude and character of the asserted injury to plaintiffs' First Amendment rights against the legitimacy and strength of the interests put forth by the state. In conducting this test, I also consider issues of comity and state sovereignty.

All parties have done a masterful job on the briefs and argument in this case and are commended for their organization, clarity and brevity. For the reasons which follow, plaintiffs' request for

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procedure, create an unconstitutional result?

[3] Plaintiffs' argument is premised primarily upon the holding in Anderson. I note that Anderson was a 5-4 decision with Justice Stevens writing for the majority with Justices Brennan, Burger, Marshall and Blackmun and with Justice Rehnquist writing the dissent joined by Justices White, Powell and O'Connor.

declaratory and injunctive relief are [sic] denied and this action is dismissed.

BACKGROUND

Every ten years, legislative districts in Oregon are reapportioned, pursuant to constitutional mandate, to respond to population changes reflected in the most recent federal census. Or. Const. Art. IV, § 6. After the 1991 legislature failed to reapportion Oregon legislative districts following the 1990 census, defendant, as the Secretary of State, did so. On December 15, 1992, the Oregon Supreme Court found that defendant's proposed reapportionment plan, with some minor adjustments, was in compliance with Constitutional standards.

The 1990 reapportionment plan altered certain district boundaries. Pursuant to Oregon Const. Art. IV, § 6(1), defendant assigned incumbent senators to the newly defined districts. The Oregon legislature

has 30 senators, one half of whom are elected each biennium, pursuant to Oregon Const. Art IV, § 4. Plaintiffs represent a group of approximately 101,137 Oregonians of voting age who were formerly represented by senators whose terms would expire in January 1993 and who are now represented by senators whose terms will not expire until January of 1995.

DISCUSSION

The claim of the "disenfranchisement" of certain voters following a constitutional reapportionment is not a novel one. Plaintiffs recognize that numerous courts have uniformly rejected similar challenges. See e.g. Mader v. Crowell, 498 F. Supp 226 (M.D. Tenn. 1980) (reapportionment plan found to be constitutional even though staggered voting resulted in temporary disenfranchisement); see also McCall v. Legislative Assembly, 291 Or. 663 (1981)

rejecting equal protection attack against six year interval following reapportionment in the absence of evidence of "invidious" discrimination). However, plaintiffs contend that the "teaching from those cases is no longer valid," in light of: (1) the Supreme Court's 1983 decision in Anderson which recognizes that voting right are constitutional rights under the First Amendment; and (2) a 1987 Oregon legislative enactment which requires that senate vacancies which occur any time up to 15 days before any mid-term general election be included within the mid-term general election for that district — an acknowledgement that the results of reapportionment are not "absolutely necessary."

Defendant argues that Anderson does not alter the analysis because any effect of a constitutional reapportionment does not implicate constitutional rights.

Defendant emphasizes that, although plaintiffs clearly have first amendment rights to free access to the ballot, they do not have a constitutional right to insist that an election take place. Defendant further contends that even if the court finds that plaintiffs have identified a constitutional concern which would trigger the balancing analysis of Anderson, the state's interest in staggered terms which it feels "promotes continuity and stability in the political process, preserves experience in the state legislature and advances efficiency and effectiveness in state government" far outweighs any temporary burden on plaintiffs.

1. Are Constitutional Rights Implicated?

In the cases which preceded Anderson, courts found that reapportionment did not implicate constitutional rights either because disenfranchisement immediately

following the process was a "natural consequence" of a constitutional action, and/or because the effect was only temporary. Therefore, the first step in my analysis is to determine what effect, if any Anderson, has on the "natural" effects of reapportionment.

In Anderson, independent presidential candidate John Anderson challenged Ohio's early filing deadline for independent candidates. The district court held that the Ohio statute was unconstitutional on two grounds. First, the court found that the statute implicated the First Amendment rights of Anderson and his Ohio supporters and diluted the value of votes for him in other states. Second, the court found that the statute implicated the equal protection clause since it only applied to independent candidates. The Sixth Circuit Court of Appeals reversed finding that the

early deadline served legitimate state and voter interests.

On review, the Supreme Court noted that although the direct impact of the early filing deadline fell upon the candidate himself, its primary concern was with the impact of "ballot access restrictions" which tend to limit the field of candidates: "[t]he right to vote is heavily burdened if that vote may be cast only for major party candidates." Anderson, 460 U.S. at 786-87.

The Court then discussed the role of the state and its interest in the administration of elections. It found that although states necessarily must enact comprehensive election codes to maintain order and prevent chaos:

> "each" provision of these schemes whether it governs the regulation and qualification of voters, the selection and eligibility of candidates or the voting process itself, inevitably affects — at least to

> some degree — the individual's right to vote and his right to associate with others for political ends."

Id., at 788 (emphasis added). Thus, when confronted with a challenge to a voting act restriction, a court must: (1) consider the "magnitude and character" of the asserted injury to rights implicated by the First and Fourteenth Amendments; and (2) identify and evaluate the precise interests put forth by the State by examining the legitimacy and strength of those interests and the extent those interests make it necessary to burden plaintiff's rights. Id., at 789.

In assessing the impact of Ohio's statute, the court found that the early filing deadline may have a "substantial impact on independent minded voters."[4] It

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[4] Although the Court noted that it was not reaching the equal protection issue which formed part of the basis for the district court's decision, Id., at 787, n.7, it did note that it would be

emphasized that the impact of the restriction was particularly heightened in the context of a national presidential primary since the results in Ohio would have an impact upon votes in other states. Id. at 793-94. The court found that the state's interest in regulating procedures with respect to a national election was less important that its interest in regulating a state-wide or local election. Id., at 795. Thus, the Court concluded that the Ohio statute placed a "significant state imposed restriction on a nationwide electoral process."

The Court then balanced the significant interests of "independent minded voters" against three interests asserted by the State: (1) voter education; (2) equal treatment for

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"especially difficult for the State to justify a restriction that limits political participation by an identifiable group." Id., at 794.

partisan and independent candidates; and (3) political stability. The court found that the first two interests were legitimate, but that Ohio's specific restriction failed to serve those ends. As to the goal of "political stability," the state argued that the statute was necessary to protect two major parties from "damaging intra-party feuding." The Court rejected this argument and held that the desire to protect existing political parties from competition was not a valid justification. Id., at 801-82.

In making this determination the Court took great pains to distinguish its decision in Storer v. Brown, 415 U.S. 724 (1974). In Storer, the Court upheld the constitutional validity of two California statutes which provided that no person could run as an independent candidate in the state's general election if he or she had been defeated in a party primary that

year or had been registered with any political party within a year of filing. The Court found that the statutes were a reasonable means of preventing "splintered parties and unrestrained factionalism." Id., at 736.

Justice Stevens distinguished Storer by noting that the restrictions were substantively different and by emphasizing that the statutes in Storer applied to state elections "wholly within the boundaries of California." Anderson, 460 U.S. at 804.

Based upon its findings that the Ohio statute imposed a significant burden on certain voters' rights and that the State had failed to articular legitimate justifications for the regulation which would outweigh the voters' First Amendment rights, the Court declared the Ohio statute unconstitutional.

Although the court's analytical framework does not expressly include deference for state policy decisions, much of the court's discussion evinces such an intention: "the state's important regulatory interests are generally sufficient to justify reasonable, non-discriminatory restrictions." Id., at 788. See also Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) (method by which people and their representatives choose to structure electoral process are [sic] entitled to "substantial" deference). Deference for state regulation was also the primary basis for the dissent authored by then Justice Rehnquist. In the dissent, Justice Rehnquist argued that the Ohio election scheme was rational and afforded all candidates reasonable access to the general election ballot either by filing within the designated deadlines or through

the write-in vote. He further argued that the majority "refused to own up to the conflict its opinion creates with Storer" and applied an improper test to the state's regulation. The dissent pointed out that the standard of review should be a deferential one in which the State statute is upheld if it is "tied to a particularized legitimate purpose" and is not "arbitrary." Id., at 817. Compare Eu v. San Francisco Cty Democratic Cent. Committee, 109 S.Ct. 1013 (1989) (state statutes which prohibited political parties from issuing endorsements and which regulated size and composition of central committees found unconstitutional where state failed to show "compelling" interests).[5]

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[5] Although the Court in Eu cites the Anderson test, it did not explain why is [sic] inserted a "compelling" interest requirement into the test. However, given the context of the challenge in that case, I infer that where the challenged state

Clearly, the facts in Anderson are distinguishable from the facts in this case. John Anderson challenged a specific regulation which placed temporal limitations on his ability to seek a national public office, and the court found that his supporters were thus, deprived of the freedom to express their preference for a candidate. In this case, as noted previously, plaintiffs do not challenge any single specific regulation — instead, they challenge the combined effect of Oregon's system of staggered elections with the 1990 reapportionment which is not per se a "ballot access restriction." On this basis alone, I find that Anderson has no impact upon the facts in this case and conclude that plaintiff's

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election law directly attempts to regulate the content of speech, such as prohibiting parties from issuing endorsements, that heightened scrutiny and "compelling" justification are required.

have failed to identify a constitutional injury.[6] Further, I find that plaintiffs have not "lost" voting rights as alleged, but instead have merely suffered a "shift" in their rights to vote from the 1992 election to the 1994 election.

However, I note that Justice Stevens' definition of a state voting procedure which would be subject to the balancing test of Anderson is quite broad. Thus, to the extent that plaintiffs have identified a circumstance, created by state action, which relates to the voting process

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[6] Defendant relies upon Burdick v. Takhushi, 927 F.2d 469 (9th Cir. 1991) for the proposition that plaintiffs have failed to identify a First Amendment interest in light of the distinction that must be drawn between the right to vote and the right to insist that an election be held. While I agree that this is a distinction that should be drawn given the teaching in Burdick, I note that the 9th Circuit discussed this distinction within the context of applying the Anderson test to the particular challenge to a state voting process in that case. Burdick is discussed in greater detail, infra.

itself, the balancing test in Anderson may have been triggered.

2. Application of the Anderson Test.

In Burdick v. Takushi, 937 F.2d 415 (9th Cir. 1991), cert. granted 112 S.Ct. 635 (Dec. 9, 1991), a Hawaiian voter challenged the state's absolute prohibition against write-in candidates. In contrast to Anderson, the court began its analysis by noting that the Tenth Amendment to the United States Constitution was intended to keep, for the States, the power to "prescribe the qualifications of its officers and the manner in which they shall be chosen" which includes the regulation of the time, places and manner of holding elections. Id., at 418, citing Sugarman v. Dougall, 413 U.S. 634, 647 (1973). However, because the question presented a challenge to a state election law, the court

employed the analysis set forth in Anderson. Id.

In assessing the "character and magnitude" of the injury to plaintiff, the court noted that although plaintiff had a fundamental right to "equal voice" in the election, that this concept did not extend to a fundamental right to vote for a particular candidate. Id. See also Rodriguez, 457 U.S. at 9-10 (recognizing fundamental right to equal access to political process, not fundamental right to vote). Then, rather than examining the nature of the injury alleged in a vacuum, the court emphasized that the right to vote "is inexorably intertwined with the State's right to regulate the election process." Burdick, at 419. The court found that because Hawaii's election laws provided candidates with "considerable ease of access to the ballot" and because the restriction was neutral as to content

and subject matter, that any restriction on plaintiff's political speech was "not substantial" and in fact, plaintiff's asserted right to vote for any candidate did not implicate fundamental constitutional protections. Id., at 420. Finally, the court examined the state's asserted interests in political stability, having an informed electorate and preserving the internal structure of the election laws and found each of these interests to be both legitimate and substantial.

Defendant relies upon Burdick to show that there is a distinction between the right to participate in an election and the right to vote per se and that plaintiffs' rights do not extend to insisting that a particular election be held. Plaintiffs rely upon Burdick for its distinguishing characteristics, arguing that unlike Burdick, plaintiffs in

this case have effectively been denied the right to participate in an election.

The only relevance and guidance that I see Burdick provides in this case is to underscore the idea that in examining the nature of the injury, courts should also consider the nature of the asserted right within the context of the state's entire electoral scheme. To extend the holding as suggested by either counsel would simply read too much into that case.

In this case, the nature of the injury asserted by plaintiffs is a temporal one — that of not being able to vote for a state senator for a six year period rather than a four year period. The combined effect of Oregon's four year staggered voting term with the reapportionment does not, as plaintiffs argue, deprive them of a right to vote or a right to participate equally with others in an election. The circumstances which

lead to this temporal deprivation did not single out certain people based upon their political affiliation. All voters residing in plaintiffs' districts, including plaintiffs, will have equal access to the ballot box in future elections.

Further, the challenge in this case is against a state system of elections for state offices. Thus, the Tenth Amendment requires that we examine the nature of the alleged injury in the context of that state system. In this case, all parties agree that the Secretary was required to redraw district lines in response to the 1990 census to correct constitutional deficiencies resulting from population changes from the 1980 reapportionment. The parties also agree that the four year staggered term provision for state senators is content neutral, that is, it

is applied to all districts in the same manner.

The magnitude of the injury, that of a two year interval, is one that courts have found is minimal. Plaintiffs do not identify, nor have I been able to find, any authority for the proposition that voters have a fundamental right to elect state senators every four years. There would be nothing to prohibit the state from amending the constitution to provide for six year terms for state senators.

Based on the foregoing, I find that the consequence that plaintiffs complain of as a result of the state's reapportionment plan will not place a substantial burden on their rights to participate in the political process.

The second step of the Anderson analysis requires me to look at the legitimacy and strength of the state's interest in proceeding with the elections,

as scheduled, and the extent to which those interests make it "necessary" to burden plaintiffs' rights.

In this case, the sole justification raised by the state in defense of the "consequence" identified by plaintiff is to preserve political stability by ensuring that, in every session, the legislature will have members who are experienced. Unlike the political stability argument urged by the state of Ohio in Anderson, the state's asserted justification is politically neutral both facially and as applied since all voters, republicans, democrats, independents, libertarians, et al., were potentially impacted by the 1990 reapportionment plan. As the Ninth Circuit noted in Burdick and the Supreme Court noted in Storer, the state's interest in promoting political stability is a legitimate one and, particularly in the context of wholly

local elections, is one that should be respected.

Plaintiffs agree that continuity in the state senate is a legitimate interest. Plaintiffs argue, however, that even if the state's justification for refusing to conduct special elections is a legitimate one, that it is not "necessary" to burden plaintiffs rights.[7] Plaintiffs point to the 1987 Congressional [sic] amendment which now requires that when a senatorial seat becomes vacant for any reason within 15 days of a general election, that the seat be placed on the general election ballot rather than the former process of appointment. Plaintiffs argue that this is an acknowledgement by the state that special elections are not too administratively burdensome. Further,

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[7] Defendant does not argue that the special election proposed by plaintiff would be either administratively burdensome or costly.

plaintiffs point out that Texas now requires general elections in all district [sic] following reapportionment. Finally, plaintiffs argue that political stability will not be affected by a special election since historical and recent local election results "suggest that it is highly unlikely that enough incumbents will be defeated to impair continuity significantly."

The relief sought by plaintiffs' points out, however, that what they are in essence urging this court to do is to question a policy decision made by the Oregon legislature not to conduct general elections following a census reapportionment. The fact that Texas has chosen to do so merely reflects that different states have taken different policy stances on this issue. When the decision ultimately reflects a state policy choice, comity and the Tenth

Amendment dictate deference to the state's chosen system. See e.g. Tashijan [sic] v. Republican Party of Connecticut, 479 U.S. 208, 222-223 and 224 at n.13 (state legislatures, not courts, should decide whether to conduct closed or open primaries); and Rodriguez, 457 U.S. at 12-14 (upholding constitutional validity of Puerto Rico law which called for senate vacancies to be filled by appointment by political party).

Finally, I cannot overlook the obvious substantial impact that a special election would have on the state senators who successfully attained what they anticipated would be a four year term of office in 1990. Unlike candidate John Anderson, the interests of these senators is [sic] in serving a complete term of office already attained.

CONCLUSION

Based on the foregoing, I find that plaintiffs have not identified a state action which has implicated their First Amendment rights to association. However, were I to reach the Anderson analysis, the interests impacted by the combined effect of a 1990 constitutional reapportionment and the state's constitutional provision for staggered senate terms are minimal while the state's justifications are substantial, legitimate and entitled to heightened deference given their wholly state-oriented nature.

DATED this 14 day of February, 1992.

/s/
Malcolm F. Marsh
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

REPUBLICAN PARTY OF OREGON, et al.,	)	
Plaintiffs,	)	Civil No. 92-35-MA
v.	)	ORDER
PHIL KEISLING, in his capacity as Secretary of the State of Oregon,	)	
Defendant,	)	

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MARSH, Judge.

In accordance with my opinion filed on this date, plaintiffs' requests for declaratory and injunctive relief are DENIED and this action is dismissed.

IT IS SO ORDERED.

DATED this 14 day of February, 1992.

/s/
Malcolm F. Marsh
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

REPUBLICAN PARTY OF OREGON, et al.,	)	
Plaintiffs,	)	Civil No. 92-35-MA
v.	)	JUDGMENT
PHIL KEISLING, in his capacity as Secretary of the State of Oregon,	)	
Defendant,	)	

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MARSH, Judge.

Based on the record, this action is dismissed.

IT IS SO ORDERED.

DATED this 14 day of February, 1992.

/s/
Malcolm F. Marsh
United States District Judge

APPENDIX C

UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CONSTITUTION OF OREGON

Article II, §§ 2 and 8

Section 2. Qualifications of electors. (1) Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen:

(a) Is 18 years of age or older;

(b) Has resided in this state during the six months immediately preceding the election, except that provision may be made by law to permit a person who has resided in this state less than 30 days immediately preceding the election, but who is otherwise qualified under this subsection, to vote in the election for candidates for nomination or election for President or Vice President of the United States or elector of President and Vice President of the United States; and

(c) Is registered not less than 20 calendar days immediately preceding any election in the manner provided by law.

(2) Except as otherwise provided in section 6, Article VIII of this Constitution with respect to the qualifications of voters in all school district elections, provision may be made by law to require that persons who vote upon questions of levying special taxes or issuing public bonds shall be taxpayers.

Section 8. Regulation of elections. The Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct. —

Article IV, §§ 4 and 6

Section 4. Term of office of legislators; classification of Senators. (1) The Senators shall be elected for the term of four years, and Representatives for the term of two years. The term of each Senator and Representative shall commence on the second Monday in January following his election, and shall continue for the full period of four years or two years, as the case may be, unless a different commencing day for such terms shall have been appointed by law.

(2) The Senators shall continue to be divided into two classes, in accordance with the division by lot provided for under the former provisions of this Constitution, so that one-half, as nearly as possible, of the number of Senators shall be elected biennially.

(3) Any Senator or Representative whose term, under the former provisions of

this section, would have expired on the first Monday in January 1961, shall continue in office until the second Monday in January 1961.

Section 6. Apportionment of Senators and Representatives. (1) At the regular session of the Legislative Assembly next following an enumeration of the inhabitants by the United States Government, the number of Senators and Representatives shall be fixed by law and apportioned among legislative districts according to population. A senatorial district shall consist of two representative districts. Any Senator whose term continues through the next regular legislative session after the effective date of his reapportionment shall be specifically assigned to a senatorial district. The ratio of Senators and Representatives,

respectively, to population shall be determined by dividing the total population of the state by the number of Senators and by the number of Representatives. A reapportionment by the Legislative Assembly shall become operative no sooner than September 1 of the year of reapportionment.

(2) This subsection governs judicial review and correction of a reapportionment enacted by the Legislative Assembly.

(a) Original jurisdiction is vested in the Supreme Court, upon the petition of any elector of the state filed with the Supreme Court on or before August 1 of the year in which the Legislative Assembly enacts a reapportionment, to review any reapportionment so enacted.

(b) If the Supreme Court determines that the reapportionment thus reviewed complies with subsection (1) of this section and all law applicable thereto, it

shall dismiss the petition by written opinion on or before September 1 of the same year and the reapportionment shall become operative on September 1.

(c) If the Supreme Court determines that the reapportionment does not comply with subsection (1) of this section and all law applicable thereto, the reapportionment shall be void. In its written opinion, the Supreme Court shall specify with particularity wherein the reapportionment fails to comply. The opinion shall further direct the Secretary of State to draft a reapportionment of the Senators and Representatives in accordance with the provisions of subsection (1) of this section and all law applicable thereto. The Supreme Court shall file its order with the Secretary of State on or before September 15. The Secretary of State shall conduct a hearing on the reapportionment at which the public may

submit evidence, views and argument. The Secretary of State shall cause a transcription of the hearing to be prepared which, with the evidence, shall become part of the record. The Secretary of State shall file the corrected reapportionment with the Supreme Court on or before November 1 of the same year.

(d) On or before November 15, the Supreme Court shall review the corrected reapportionment to assure its compliance with subsection (1) of this section and all law applicable thereto and may further correct the reapportionment if the court considers correction to be necessary.

(e) The corrected reapportionment shall become operative upon November 15.

(3) This subsection governs enactment, judicial review and correction of a reapportionment if the Legislative Assembly fails to enact any reapportionment by July 1 of the year of

the regular session of the Legislative Assembly next following an enumeration of the inhabitants by the United States Government.

(a) The Secretary of State shall make a reapportionment of the Senators and Representatives in accordance with the provisions of subsection (1) of this section and all law applicable thereto. The Secretary of State shall conduct a hearing on the reapportionment at which the public may submit evidence, views and argument. The Secretary of State shall cause a transcription of the hearing to be prepared which, with the evidence, shall become part of the record. The reapportionment so made shall be filed with the Supreme Court by August 15 of the same year. It shall become operative on September 15.

(b) Original jurisdiction is vested in the Supreme Court upon the petition of

any elector of the state filed with the Supreme Court on or before September 15 of the same year to review any reapportionment and the record made by the Secretary of State.

(c) If the Supreme Court determines that the reapportionment thus reviewed complies with subsection (1) of this section and all law applicable thereto, it shall dismiss the petition by written opinion on or before October 15 of the same year and the reapportionment shall become operative on October 15.

(d) If the Supreme Court determines that the reapportionment does not comply with subsection (1) of this section and all law applicable thereto, the reapportionment shall be void. The Supreme Court shall return the reapportionment by November 1 to the Secretary of State accompanied by a written opinion specifying with

particularity wherein the reapportionment fails to comply. The opinion shall further direct the Secretary of State to correct the reapportionment in those particulars, and in no others, and file the corrected reapportionment with the Supreme Court on or before December 1 of the same year.

(e) On or before December 15, the Supreme Court shall review the corrected reapportionment to assure its compliance with subsection (1) of this section and all law applicable thereto and may further correct the reapportionment if the court considers correction to be necessary.

(f) The reapportionment shall become operative on December 15.

(4) Any reapportionment that becomes operative as provided in this section is a law of the state except for purposes of initiative and referendum. A reapportionment shall not be operative

before the date on which an appeal may be taken therefrom or before the date specified in this section, whichever is later.

(5) Notwithstanding section 18, Article II of this Constitution, after the convening of the next regular legislative session following the reapportionment, a Senator whose term continues through that legislative session is subject to recall by the electors of the district to which the Senator is assigned and not by the electors of the district existing before the latest reapportionment. The number of signatures required on the recall petition is 15 percent of the total votes cast for all candidates for Governor at the most recent election at which a candidate for Governor was elected to a full term in the two representative districts comprising the senatorial district to which the Senator was assigned.

O.R.S. 171.051 (current version)

Filling vacancies in Legislative Assembly. (1) When any vacancy occurs in the Legislative Assembly due to death or recall or by reason of resignation filed in writing with the Secretary of State or a person is declared disqualified by the house to which the person was elected, the vacancy shall be filled by appointment if:

(a) The vacancy occurs during any session of the Legislative Assembly;

(b) The vacancy occurs in the office of a state Representative before the 60th day before the general election to be held during that term of office;

(c) The vacancy occurs in the office of a state Senator before the 60th day before the first general election to be held during that term of office;

(d) The vacancy occurs in the office of a state Senator at any time after the 15th day before the first general election

and before the 60th day before the second general election to be held during that term of office; or

(e) A special session of the Legislative Assembly will be convened before a successor to the office can be elected and qualified.

(2) The person appointed under the provisions of subsection (1) of this section shall be a citizen qualified to hold the office, an elector of the affected legislative district and a member of the same political party for at least 180 days before the date on which the vacancy occurred. The political affiliation of a person appointed under subsection (1) of this section shall be determined under ORS 236.100. The appointment shall be made by the county courts or boards of county commissioners of the affected counties pursuant to ORS 171.060 to 171.064. When the

provisions of ORS 171.060 (1) are applicable, the appointment shall be made from a list of not fewer than three nor more than five nominees who have signed written statements indicating that they are willing to serve furnished by the Secretary of State. If fewer than three names of nominees are furnished, a list shall not be considered to have been submitted and the county courts or boards of county commissioners shall fill the vacancy. The vacancy must be filled by appointment within 30 days after its occurrence or not later than the time set for the convening of the special session described in paragraph (e) of subsection (1) of this section when that is the basis for filling the vacancy.

(3) If the appointing authority required by this section to fill the vacancy does not do so within the time

allowed, the Governor shall fill the vacancy by appointment within 10 days.

(4) Notwithstanding any appointment under the provisions of paragraph (c) of subsection (1) of this section, when a vacancy occurs in the office of a state Senator before the 15th day before the first general election to be held during that term of office, the remaining two years of the term of office shall be filled by the electors of the affected legislative district at the first general election.

(5) Candidates for the remaining two years of the term of office of a state Senator under subsection (4) of this section shall be nominated as provided in ORS chapter 249 except as follows:

(a) A major political party, minor political party, assembly of electors or individual electors may select a nominee

for any vacancy occurring before the 15th day before the first general election; and

(b) The Secretary of State shall accept certificates of nomination and notifications of nominees selected by party rule and filed with the secretary pursuant to a schedule for filing set by the Secretary of State but in any case not later than the 10th day before the first general election.

(6) The remaining two years of the term of office of a state Senator under subsection (4) of this section will commence on the second Monday in January following the general election. Any appointment under the provisions of paragraph (c) of subsection (1) of this section shall expire when a successor to the office is elected and qualified.

O.R.S. 171.051 (before 1987 amendments)

Filling vacancies in Legislative Assembly. (1) When any vacancy occurs in the Legislative Assembly due to death or recall or by reason of resignation filed in writing with the Secretary of State or a person is declared disqualified by the house to which the person was elected, the vacancy shall be filled by the electors of the affected legislative district at the next general election unless:

(a) The vacancy occurs during any session of the Legislative Assembly;

(b) A general election will not be held within 90 days after the date the vacancy occurs; or

(c) A general election will be so held, but a special session of the Legislative Assembly will be convened before a person is elected at the general election to fill the vacancy and assumes the duties of the office.

(2) If the vacancy occurs at a time described in subsection (1) of this section, the vacancy shall be filled by appointment of a person qualified to hold the office who is an elector of the legislative district by the county courts or boards of county commissioners of the affected counties pursuant to ORS 171.060 to 171.064. The appointment shall be made from a list of not fewer than three nor more than five nominees furnished by the Secretary of State pursuant to ORS 171.060 (1). If fewer than three names of nominees are furnished, a list shall not be considered to have been submitted and the county courts or boards of county commissioners shall fill the vacancy. The person so appointed must have been a member of the same major political party at least 180 days before the date the vacancy to be filled occurred. The vacancy must be filled by

appointment within 30 days after its occurrence or not later than the time set for the convening of the special session described in paragraph (c) of subsection (1) of this section when that is the basis for filling the vacancy.

(3) If the appointing authority required by this section to fill the vacancy does not do so within the time allowed, the Governor shall fill the vacancy by appointment.

APPENDIX D

JOHN R. FAUST, JR. - OSB 58024
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(503) 227-2900

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

REPUBLICAN PARTY OF OREGON, JAMES WORTHINGTON, WILLIAM F. CLEMENTS, CLEO H. PETERSON, DONALD W. TOBIAS, RICHARD L. DIXON, R. STONE ROSE, CLAYTON ZEEB and ANITA B. EBERLEIN, Plaintiffs, vs. PHIL KEISLING, in his capacity as Secretary	)	Civil No. 92-35MA STIPULATED FACTS

of State of the State of Oregon,)
)
)
Defendant.)

Plaintiffs and defendant hereby stipulate to the following facts for the purpose of trial:

1. Plaintiff, the Republican Party of Oregon, is a major political party organized and functioning in accordance with ORS 248. As a political party, plaintiff the Republican Party of Oregon represents 561,367 persons who have registered in every state senate district in Oregon to vote as Republicans. Many of plaintiff's members are adversely impacted in the manner referred to herein. This plaintiff aggressively seeks to protect the speech and associational rights of its members under the First Amendment to the United States Constitution.

2. Plaintiff, Richard L. Dixon, is a registered voter. He was a registered

voter for the November 1988 general election. He currently resides within state senate district No. 14 represented by Senator Bob Kintigh. Prior to the 1991 reapportionment, his residence was included in state senate district No. 11. He voted in the November 1988 general election and, but for the 1991 reapportionment, would have had an opportunity to vote for or against the candidates for state senate district No. 11. As a result of reapportionment, he will not have an opportunity to vote in November of 1992 for a state senator.

3. Plaintiff, James Worthington, is a registered voter. He was a registered voter for the November 1988 general election. He currently resides within state senate district No. 9 represented by Senator Frank Roberts. Prior to the 1991 reapportionment, his residence was included in state senate district No. 11.

He voted in the November 1988 general election and, but for the 1991 reapportionment, would have had an opportunity to vote for or against the candidates for state senate district No. 11. As a result of apportionment, he will not have an opportunity to vote in November of 1992 for a state senator.

4. Plaintiff, Clayton Zeeb, is a registered voter. He was a registered voter for the November 1988 general election. He currently resides within state senate district No. 16 represented by Senator Jim Hill. Prior to the 1991 reapportionment, his residence was included in state senate district No. 15. He voted in the November 1988 general election and, but for the 1991 reapportionment, would have had an opportunity to vote for or against the candidates for state senate district No. 15. As a result of reapportionment,

he will not have an opportunity to vote in November of 1992 for a state senator.

5. Plaintiff, Ronald W. Tobias, is a registered voter. He was a registered voter for the November 1988 general election. He currently resides within state senate district No. 13 represented by Senator Joyce Cohen. Prior to the 1991 reapportionment, his residence was included in state senate district No. 4. He voted in the November 1988 general election and, but for the 1991 reapportionment, would have had an opportunity to vote for or against the candidates for state senate district No. 4. As a result of reapportionment, he will not have an opportunity to vote in November of 1992 for a state senator.

6. The table attached hereto as Exhibit A accurately reflects the number of persons of voting age in the state of Oregon who, prior to the 1991

reapportionment, resided in districts that would have voted for Oregon State Senate candidates in 1992, but have been assigned to districts that are not currently scheduled for an election to choose state senators until November 1994.

7. On or about December 30, 1991, plaintiff, the Republican Party of Oregon, through its chairman, Craig Berkman, made demand upon defendant to conduct primary elections for all members of the Oregon State Senate in May of 1992 and general elections for all members of the Oregon State Senate at the regular general election scheduled in November of 1992.

8. On or about January 2, 1992, defendant informed plaintiff's counsel that defendant lacked authority to comply with plaintiff Republican Party's request. A copy of defendant's response is appended hereto marked Exhibit B and incorporated herein.

9. On or about January 3, 1992, plaintiff the Republican Party of Oregon responded to defendant's correspondence of January 2, 1992, and further notified defendant of its intention to file this action.

10. Candidates for members of the Oregon State Senate must file their notices of candidacy by March 10, 1992.

11. Major political primary elections will be held on May 19, 1992.

DATED this ____ day of February, 1992.

For plaintiffs:
SCHWABE, WILLIAMSON & WYATT
O'CONNELL, GOYAK & DILORENZO

By_____
JOHN R. FAUST, JR.
OSB 58024

For defendant:

_____
Jack Landau
Deputy Attorney General

Senate District Schedule for 1994	Incumbent	Disenfranchised Persons				
		From Dist. #	Under 18	18 or over	Total	% of Dist
1	Dukes	2	4,949	16,081	21,030	22.12%
3	Shoemaker	4	2,639	8,734	11,373	12.01%
5	Hamby	2	785	1,816	2,601	2.72%
9	Frank Roberts	7	6,314	17,120	23,434)	
		10	407	1,078	1,485)	50.26%
		11	6,062	16,261	22,323)	
13	Cohen	2	241	598	839)	
		4	4,572	10,899	15,471)	17.13%
14	Kintigh	7	670	2,133	2,803)	
		11	1,839	4,965	6,804)	10.12%
16	Jim Hill	15	571	1,635	2,206	2.32%
17	Trish Smith	15	153	808	961	1.01%

Senate District Schedule for 1994	Incumbent	Disenfranchised Persons From Dist. #	Under 18	18 or over	Total	% of Dist
18	Cliff Trow	2	1,333	3,423	4,756	5.02%
19	Mae Yih			- 0 -		
20	Kerans			- 0 -		
22	Jolin	2	134	365	499)	
		23	726	1,968	2,964)	3.64%
		24	72	210	282	
26	Hannon	23	59	204	263)	
		25	4,462	12,839	17,301)	18.51%

PHIL KEISLING
SECRETARY OF STATE

MICHAEL GREENFIELD
DEPUTY SECRETARY
OF STATE

STATE OF OREGON
SECRETARY OF STATE
136 STATE CAPITOL
SALEM, OR 97310-0722
(503) 378-4139

January 2, 1992

John DiLorenzo, Jr.
O'Connell, Goyak & DiLorenzo
121 SW Morrison Street
Portland, OR 97204-3186

Dear Mr. DiLorenzo:

Your December 30, 1991, letter requests that I take the "somewhat extraordinary" action of immediately ordering summary elections for all Oregon State Senate members because some Oregon voters are unable to vote on a state senator for six years. This situation resulted as an inevitable consequence of the 1991 legislative redistricting for which I had responsibility.

My primary responsibility as chief elections officer of the state is to assure that elections are conducted in accordance with the law. Your letter cites no authority which would empower me to violate Article IV, Section 4 of the Oregon Constitution which provides that all senators are elected to four year terms which are staggered. Nor does it cite any authority which would empower me to overrule an Oregon Supreme Court opinion which specifically rejected this as a problem in McCall v. Legislative Assembly, 291 OR 663 (1981).

After consulting with the Attorney General's office, I have concluded that I do not have the authority to comply with your request.

Because I am not eager to spend additional Oregon taxpayer's money on another redistricting lawsuit, I do not plan to commit state resources to extensively research the federal constitutional issues you are raising until you file suit. At such time, I will carefully research those issues, but also push for speedy resolution so that the orderly conduct of the 1992 election will not be jeopardized.

Sincerely,

/s/
Phil Keisling
Secretary of State

cc: Lynn Rosik, Department of Justice
Jack Faust
Craig Berkman